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No. 349

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IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHEASTERN GREYHOUND LINES and G. D. (HAPPY) MASTERS,
Petitioners,

vs.

FRANK A. McCAFFERTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHEASTERN GREYHOUND LINES and G. D. (HAPPY) MASTERS,
Petitioners,

vs.

FRANK A. McCAFFERTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioners, Southeastern Greyhound Lines and G. D. (Happy) Masters, do hereby petition this court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on the 3rd day of June, 1948, pursuant to written opinion filed on said date. This opinion is reported in 169 Fed. 2nd, page 1, Sept. 13, 1948, Adv. Sheets.

1. Petitioner, Southeastern Greyhound Lines, is a corporation organized under the laws of the State of Kentucky, and was at all times hereinafter set out and is now

engaged in the transportation of passengers for hire by motor bus.

2. G. D. (Happy) Masters is a citizen of the State of Kentucky and was at all times hereinafter set out employed by Southeastern Greyhound Lines as its driver.

3. Respondent, Frank A. McCafferty, is a citizen of the State of Michigan.

4. Respondent, Frank A. McCafferty, filed suit in the United States District Court for the Western District of Kentucky against petitioners herein, seeking judgment against said petitioners for injuries sustained by him as the result of the negligent operation of a bus driven by Masters and owned by Southeastern Greyhound Lines.

5. Upon the trial of the issues before a jury, a verdict was rendered against Southeastern Greyhound Lines in the sum of Twelve Thousand Five Dollars and Fifty Cents ($12,005.50) but no verdict was rendered against the petitioner, Masters.

6. That prior to the submission of the case to the jury a form verdict was prepared by the Clerk under the direction of the Court and the name of this respondent was set out as plaintiff and the names of these petitioners were set out as defendants. When the verdict was returned into court a line had been drawn through the name of the petitioner, Masters, and the clerk entered a judgment on the verdict against Southeastern Greyhound Lines and rendered no judgment of any kind against the petitioner, Masters.

7. That thereafter petitioners filed a motion and grounds for a new trial, setting up, among other things, that the verdict of the jury and the judgment of the court were contrary to the law.

8. That thereafter an order was entered overruling the motion and grounds for a new trial; that after this order was entered the petitioners filed a motion to set aside the order overruling the motion and grounds for a new trial and also filed a motion for a judgment on the verdict; that thereafter these motions were overruled and an appeal perfected to the United States Circuit Court of Appeals for the Sixth Circuit.

9. The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court.

REASONS FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals and the opinion of the District Court in this case are in conflict with applicable local decisions of the Court of Appeals, the court of last resort in the Commonwealth of Kentucky, and the decision by the Sixth Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals on the same questions.

1. The decision of the District Court and the Circuit Court of Appeals held that although a jury found only against the master, Southeastern Greyhound Lines, and made no finding against the servant, Masters, the judgment can be upheld against the master.

The decision on this point is in conflict with the decisions of the Court of Appeals of Kentucky, the court of last resort, in the cases of I. C. Railroad Co. v. Applegate's Adm'r, 268 Ky. 458; L. & N. Ry. Co. v. Farney, 295 Ky. 8, and C. & O. Ry. Co. v. Williams' Admr., 300 Ky. 850, and is in conflict with the decision of the Supreme Court in the case of Erie Railroad Co. v. Tompkins, 304 U. S. 64.

2. The decision of the District Court and the Circuit Court of Appeals, in holding that the case as to Masters,

the driver and servant, was not dismissed when the jury made no finding either for or against him, is in conflict with the decision of the Court of Appeals on this subject. Dillon v. Harkleroad, 295 Ky. 308.

3. The lower court furnished a form to the jury for use in returning a verdict and the caption thereof showed the style of the case and named the two defendants as such and the jury struck the name of one of the defendants from the caption and returned a verdict for the plaintiff with the name of one of the defendants so stricken from the caption thereof. The lower court failed to pass on this question but the Circuit Court of Appeals held that the plaintiff was not required to obtain a verdict and judgment against the servant as a prerequisite to recover against the master, Southeastern Greyhound Lines. This is in conflict with the decisions of the Court of Appeals on this question. I. C. Railroad Co. v. Applegate's Adm'r, supra; L. & N. Ry. Co. v. Farney, supra; French v. Creswell, 130 Oregon 418.

4. The Circuit Court of Appeals held that a verdict against the master and in favor of the servant or against the master alone, when both master and servant are defendants and the sole basis for the liability of the master is the alleged negligence of the servant, supports a judgment against the master, and in upholding the decision, it is in conflict with the decision of the Court of Appeals of Kentucky, supra, on this question.

5. The Circuit Court of Appeals held that a judgment for the plaintiff against the master should not be set aside and a judgment entered dismissing the plaintiff's petition upon a verdict of the jury against the master and for the servant, and in so holding, this decision is in conflict with the decision of the Court of Appeals of Kentucky on this question. See cases cited, supra.

6. The Circuit Court of Appeals held that because of the failure of the petitioners to object to the charge given to the jury by the trial court, it deprived the petitioners of the right to take advantage of the verdict, and in so holding is in conflict with the decision of the Court of Appeals of Kentucky. See L. & N. Ry. Co. v. Farney, supra.

7. The Circuit Court of Appeals held that by reason of the failure of the petitioners to object to the form of the verdict at the time it was rendered, it deprived the petitioners of the right to have a judgment entered in accordance with the intention of the jury as shown by the verdict, and such a decision is in conflict with the decision of the Court of Appeals which holds that a verdict against the master and in favor of the servant, in a suit based solely on the negligence of the servant, cannot stand. L. & N. Ry. Co. v. Farney, supra; Dillon v. Harkleroad, supra; C. & O. Ry. Co. v. Williams' Adm'r, supra.

8. The Circuit Court of Appeals, in holding that a motion for a judgment on the verdict was unauthorized, is in conflict with the decision of the Court of Appeals of Kentucky and the decision of the Ninth Circuit Court of Appeals. Bateman v. Donovan, 131 Fed. (2d) 759; Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078.

9. The opinion of the Sixth Circuit Court of Appeals held that because the petitioners made no motion for a directed verdict, that they were estopped from raising any question as to any errors. This decision is in conflict with the decision of the Court of Appeals of Kentucky in that a motion for a judgment notwithstanding the verdict can only be sustained when pleadings were insufficient to sustain the judgment. Carroll's Kentucky Code, Section 386; Roe v. Gentry's Executor, 290 Ky. 598; Wheeldon v. Regenhardt Cons. Co., 284 Ky. 603.

We submit that the questions presented by your petitioners for a writ are of sufficient importance to be reviewed by this Honorable Court because the Circuit Court of Appeals departed from the decision in the Erie Railroad v. Tompkins case, supra, by deciding the questions contrary to the decision on the points involved as expressed by the Court of Appeals of Kentucky.

PRAYER FOR WRIT.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals, had in the case numbered and entitled Docket No. 10,584, Southeastern Greyhound Lines and G. D. (Happy) Masters, Appellants, v. Frank A. McCafferty, Appellee, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by this court and for such further relief as the court may deem proper.

Dated: Lexington, Kentucky, the 20th day of September, 1948.

SOUTHEASTERN GREYHOUND LINES and
G. D. (HAPPY) MASTERS,
Petitioners,

By R. W. KEENON,
Counsel for Petitioners.

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602 Bank of Commerce Building,
Lexington, Kentucky,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We have already set out in the petition a detailed statement of the facts and the errors claimed by the petitioners.

ARGUMENT.

1. The decision of the District Court and the Circuit Court of Appeals held that although a jury found only against the master, Southeastern Greyhound Lines, and made no finding against the servant, Masters, the judgment can be upheld against the master.

In the opinion of the Circuit Court of Appeals rendered in this case, the following language is used:

> "He was not required to obtain a verdict and judgment of liability against Masters individually as a prerequisite to recovery against Southeastern."

Since the decision in the case of Erie Railroad v. Tompkins, 304 U. S. 64, in which case the Federal Court acquired jurisdiction because of diversity of citizenship, the Kentucky law must be followed. The respondent is a citizen of Michigan and filed this suit in the Federal Court for the western district of Kentucky. The opinion of the Circuit Court of Appeals on this question is in direct conflict with all of the decisions of the Court of Appeals of Kentucky.

The clerk, under the direction of the Court, prepared a form verdict and included the names of Masters and Southeastern Greyhound Lines as defendants and McCafferty as plaintiff. The jury retired and struck out the name of G. D. (Happy) Masters and returned a verdict,

> "We, the jury, find for the plaintiff."

Thereafter, the Clerk of the Court entered a judgment against Southeastern Greyhound Lines and made no entry of any kind as to the defendant and petitioner, Masters. In the case of Dillon v. Harkleroad, 295 Ky. 308, in discussing a verdict of this kind, the court said,

> "It is true that in the instant case the court did not expressly say in its verdict 'We, the jury, find for the defendant, Clarence Dunnaway,' but it clearly declined to find against him, which is undoubtedly and undeniably a finding for him."

In the case of French v. Creswell, 130 Oregon 418, the court was called upon to interpret a verdict similar in all respects to the one involved herein. The verdict read as follows,

> "In the Circuit Court of the State of Oregon for Morrow County" with the full names of the parties plaintiff and defendant. A line was drawn across and through the name of one of the two defendants and the verdict read:
>
> > "We, the jury, find a verdict for the plaintiff herein, the sum of $16.75."

In this case the court held that the jury intended to return a verdict against the defendant whose name was not deleted and against that defendant alone.

Therefore, under these decisions, it is perfectly clear that the jury did not make a finding against Masters and under such circumstances it amounts to a finding for Masters. The question then resolves itself to whether or not where a master is sued for negligence of the servant and the servant is named as a defendant and the jury returns a verdict for the servant and against the master, can such a verdict stand under the laws of Kentucky?

The first case on this subject is I. C. Railroad Co. v. Murphy's Admr., 123 Ky. 787. In that case the master

and servant were made defendants. The jury returned a verdict for the servant and against the master and the Court of Appeals upheld such a judgment. In the case of I. C. Railroad Co. v. Applegate's Admr., 268 Ky. 458, the court affirmed a similar judgment because it was tried on the strength of the law as made in the Murphy case, but the court served notice that in the future, where such a verdict was rendered, that the master would be entitled to a judgment. Since that time, the Court of Appeals has so ruled. L. & N. Ry. Co. v. Farney, 295 Ky. 8; C. & O. v. Williams, 300 Ky. 850.

In the Applegate case, the court said:

> "In other jurisdictions, where the question has been considered, it is held that a verdict against the master, after a finding in favor of the servant, in an action brought against the master and servant for damages caused solely by the negligence of the servant, is inconsistent and illogical and should not be permitted to stand."

In the case of L. & N. v. Farney, the court said:

> "Thus we are forced to the conclusion that since the verdict ultimately rendered cannot be interpreted otherwise but as an exoneration of the employee defendants, the court was wholly without power to enter any judgment against the employer defendant as long as the verdict remained operative."

Under these decisions of the Court of Appeals of Kentucky, we say that since the verdict of the jury was only against the master and in favor of the servant, that a judgment against the master cannot stand.

2. The decision of the District Court and the Circuit Court of Appeals, in holding that the case as to Masters, the driver and servant, was not dismissed when the jury

made no finding either for or against him, is in conflict with the decision of the Court of Appeals on this subject. Dillon v. Harkleroad, 295 Ky. 308.

We have already discussed this question and it will not be necessary to make any further comment except to again call the court's attention to the cases of French v. Creswell, 130 Oregon 418; Dillon v. Harkleroad, supra, and Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078.

In the Greyhound case, the Court said:

> "The judgment in this case cannot stand, since under the pleadings the corporate defendant's liability, if any, is wholly dependent upon a finding by the jury that the alleged negligent acts of its employee caused plaintiff's injuries and the servant having been exonerated by the verdict of the jury, it follows that there can be no liability on the part of the master and the judgment against it cannot therefore stand and must be reversed."

The trial court refused to enter a judgment dismissing Masters and the Circuit Court of Appeals held that the appeal as to Masters should be dismissed, which means that although the judgment has been rendered against Southeastern Greyhound Lines, the case is still pending on the District Court docket as against Masters, and we feel that under the opinions that we have cited, that Masters is entitled to have a judgment entered dismissing the case as to him.

3. The lower court furnished a form to the jury for use in returning a verdict and the caption thereof showed the style of the case and named the two defendants as such and the jury struck the name of one of the defendants from the caption and returned a verdict for the plaintiff with the name of one of the defendants so stricken from

the caption thereof. The lower court failed to pass on this question but the Circuit Court of Appeals held that the plaintiff was not required to obtain a verdict and judgment against the servant as a prerequisite to recover against the master, Southeastern Greyhound Lines. This is in conflict with the decisions of the Court of Appeals on this question. I. C. Railroad Co. v. Applegate's Adm'r, supra; L. & N. Ry. Co. v. Farney, supra; French v. Creswell, 130 Oregon 418.

The opinion of the Court of Appeals held as follows:

> "We do not approve the form of the verdict against Southeastern as being clearer than other forms that might have been used, but after all, it was a form furnished by the court with no objection from counsel and was a verdict. We have examined the record and conclude that there was evidence to sustain it."

It was not necessary for the petitioners to object to the form of the verdict but we say that neither did the respondents object to the form of the verdict. If the court will read the evidence in the case, it will become perfectly apparent that there was no proof of any consequence save the testimony of the respondent that the driver was guilty of negligence.

We believe that the jury, by its verdict, intended to hold that the driver was not guilty of any negligence but at the same time, because of its sympathy for the plaintiff, awarded a verdict against Southeastern Greyhound Lines.

We have already pointed out the authorities on this subject and we do not deem it necessary to say anything further on this question.

4. The Circuit Court of Appeals held that a verdict against the master and in favor of the servant or against

the master alone, when both master and servant are defendants and the sole basis for the liability of the master is the alleged negligence of the servant, supports a judgment against the master, and in upholding the decision, it is in conflict with the decision of the Court of Appeals of Kentucky on this question.

We have already called the court's attention to the authorities of the Court of Appeals of Kentucky on this subject. These authorities hold that the master is only held liable by reason of the negligence of the servant and if there was a finding under Kentucky authorities for the servant, then the court should have sustained the motion of the petitioner, Southeastern Greyhound Lines, for a judgment on the verdict, not a judgment notwithstanding the verdict.

5. The Circuit Court of Appeals held that a judgment for the plaintiff against the master should not be set aside and a judgment entered dismissing the plaintiff's petition upon a verdict of the jury against the master and for the servant, and in so holding, this decision is in conflict with the decision of the Court of Appeals of Kentucky on this question. See cases cited, supra.

The same authorities and reasoning apply to this question as to those set out under the other grounds.

6. The Circuit Court of Appeals held that because of the failure of the petitioners to object to the charge given to the jury by the trial court, it deprived the petitioners of the right to take advantage of the verdict, and in so holding is in conflict with the decision of the Court of Appeals of Kentucky. See L. & N. Ry. Co. v. Farney, supra.

The opinion of the Circuit Court of Appeals held that the lower court declined to allow additional and supplemental motions to be filed, presumably on the grounds that

it was but an extension and amplification of its motion for a judgment notwithstanding the verdict, because the petitioners had never moved for a directed verdict at any time during the progress of the trial and because it was filed more than ten days after the verdict.

The motion of June 21st was not a motion for a judgment notwithstanding the verdict. We did not contend that the petitioners were entitled to a directed verdict and certainly by the petitioners failing to make a motion for a judgment notwithstanding the verdict they did not lose any of their rights. They were not entitled to have either of said motions sustained had they been made. On a motion for a judgment notwithstanding the verdict the court cannot consider the testimony but only the pleadings in the case. The motion and grounds for a new trial were filed within ten days. The motion later filed was for the purpose of setting aside the order overruling the motion and grounds for a new trial. Thereafter the petitioners filed a motion to set aside the order overruling the motion for a new trial and offered additional grounds for a new trial. This may be done under the Federal rules of civil procedure as held by the District Court in the case of Alcaro v. Jean Jordeau, Inc. (D. Ct. N. J.), 6 Fed. Rules Serv. 7 B 2, Case 2, and Williamson v. Williamson Pulp & Paper Co., 8 Fed. Rules Serv. 7 B 2, Case 1.

By its original motion for a new trial and its motion to set aside the order overruling the motion for a new trial, petitioners did ask that the verdict of the jury and the judgment thereon against Southeastern Greyhound Lines be set aside and a new trial granted. It sought more than a new trial. It sought to have the judgment against it set aside and a judgment in its favor entered dismissing the plaintiff's petition against it. We contend that the ruling of the court in entering the judgment against Southeastern Greyhound Lines upon the verdict is in effect an

exoneration of the petitioner, Masters, and was not such an error as must be raised by a motion for a new trial in the lower court in order to be considered by the appellate court.

In Bateman v. Donovan, 131 Fed. (2d) 759, C. C. A. 9, it appears that the trial court granted a new trial and subsequently on motion of the appellees, filed forty-seven days later, setting aside such an order, the question was presented whether the District Court had power to reconsider its order granting a new trial, and the Ninth Circuit Court held:

> "It is true * * * that the Federal Rules of Civil Procedure make no provision for such action, but it is likewise true that they do not forbid it."

The Court also pointed out that under Federal rules the court has the power to vacate any final decrees of judgment. National Popsicle Corp. v. Hughes, 32 Fed. (Supp.) 397.

In the case of Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078, it was held that a motion for a new trial is not necessary in cases of this kind. There is a general rule that a motion for a new trial is not necessary in order to give the appellate court the right to correct an error which appears on the face of the record. Glenn v. Montgomery Ward Co., 160 Kansas 488; Pure Oil Co. v. Quarles, 183 Okla. 418; Leonard v. Tulsa Building & Loan Assoc., 184 Okla. 558.

7. The Circuit Court of Appeals held that by reason of the failure of the petitioners to object to the form of the verdict at the time it was rendered, it deprived the petitioners of the right to have a judgment entered in accordance with the intention of the jury as shown by the verdict, and such a decision is in conflict with the decision

of the Court of Appeals which holds that a verdict against the master and in favor of the servant, in a suit based solely on the negligence of the servant, cannot stand. L. & N. R. Co. v. Farney, supra; Dillon v. Harkleroad, supra; C. & O. Ry. Co. v. Williams' Admr., supra.

We fail to understand why the court found that the respondent might take advantage of so much of the verdict as found in favor of Southeastern Greyhound Lines and the obvious finding in favor of the petitioner, Masters, when the respondent did not object to the form of the verdict or make any motion for the jury to clarify it, and at the same time say that the failure of the petitioners to object to the form of the verdict or to make a motion for its clarification would deprive them of their rights thereunder.

No cases were cited by the court nor by opposing counsel to the effect that failure to object to the form of such a verdict as is herein involved or failure to make a motion for its clarification by the jury when it was rendered precludes the petitioners from relying upon such a verdict and we have been unable to find any such cases in our research.

In the case of L. & N. Ry. Co. v. Farney, supra, one of the defendants did move the court to have the jury make its verdict more specific as to which defendant it found against but this was not found to be controlling by the appellate court.

In Dillon v. Harkleroad, supra, and C. & O. Ry. Co. v. Williams, it does not appear that the defendants made any question as to the form of the verdict at the time it was rendered or any motion for the jury to clarify the verdict, although the verdict was against one of the employer defendants and made no motion of or specific finding as to the other defendant.

The Circuit Court opinion holds that petitioners did not object to the instruction given by the trial court. The trial court admitted that the instructions as given were incorrect because under the court's charges or instructions the jury was informed that it might render a verdict for one of the defendants and against the other or might render a joint verdict. It is true that neither the petitioners nor the respondent made any objection to this charge. We see no reason why petitioners should have been required to make an objection, but in the case of L. & N. Ry. Co. v. Farney, supra, a similar instruction was given by the lower court and no objections were taken by plaintiff or defendant. The Court of Appeals in that case held that although no objections were made to the instructions, still the case would be reversed because the servant was found not guilty of negligence and therefore the master was relieved.

8. The Circuit Court of Appeals, in holding that a motion for a judgment notwithstanding the verdict was unauthorized, is in conflict with the decision of the Court of Appeals of Kentucky and the decision of the Ninth Circuit Court of Appeals. Bateman v. Donovan, 131 Fed. (2d) 759; Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078.

Under Carroll's Kentucky Code, Section 386, it is provided that a judgment shall be given for the party whom the pleadings entitle thereto, although there may have been a verdict against him.

In the case of Roe v. Gentry's Executor, 290 Ky. 598, it was held,

> "The court sustained the motion for a judgment notwithstanding the verdict on the theory that the evidence did not sustain the verdict. Neither the common law nor the code permits the use of such a motion

to test the sufficiency of the evidence adduced on the trial. The motion is applicable to the rights of the parties as disclosed by the pleadings only."

9. The opinion of the Sixth Circuit Court of Appeals held that because the petitioners made no motion for a directed verdict, that they were estopped from raising any question as to any errors. This decision is in conflict with the decision of the Court of Appeals of Kentucky in that a motion for a judgment notwithstanding the verdict can only be sustained when pleadings were insufficient to sustain the judgment. Carroll's Kentucky Code, Section 386; Roe v. Gentry's Executor, 290 Ky. 598; Wheeldon v. Regenhardt Cons. Co., 284 Ky. 603.

In the case of Wheeldon v. Regenhardt Cons. Co., supra, it was held:

"If a verdict was rendered in behalf of the plaintiff against these appellees, the trial court was warranted in sustaining a motion for a judgment notwithstanding the verdict only if the pleadings were insufficient to sustain the judgment."

The Circuit Court of Appeals holds that since the petitioners did not make a motion for a judgment notwithstanding the verdict of the jury in the lower court, it was estopped from raising any question in reference to the verdict and judgment.

As we have pointed out a judgment notwithstanding the verdict can only prevail where the pleadings are insufficient to support the verdict, but a judgment on the verdict is where the verdict will not support the judgment and we have already pointed out that under the facts in this case the verdict does not support the judgment of the court.

We have previously called the court's attention to the fact that a motion for a new trial in cases of this character is not necessary and it is the right of the court to correct any errors found on an appeal.

CONCLUSION.

In conclusion, we say that under the authorities, the Circuit Court of Appeals erred in refusing to reverse this case and order that a judgment be entered for the petitioner, Southeastern Greyhound Lines, on the verdict, and that a judgment be entered dismissing the petition as to petitioner, Masters, or certainly the case should be reversed with directions to grant a new trial in order that the court may, under proper instructions, ascertain whether or not a jury will say the servant was guilty of any negligence.

Respectfully submitted,

SOUTHEASTERN GREYHOUND LINES and
G. D. (HAPPY) MASTERS,
Petitioners,

By R. W. KEENON,
Counsel for Petitioners.

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Lexington, Kentucky,
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SOUTHEASTERN GREYHOUND LINES and
G. D. (HAPPY) MASTERS,
Petitioners,

vs.

FRANK A. McCAFFERTY,
Respondent.

RESPONSE AND BRIEF

Of Respondent to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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NO. 349, OCTOBER TERM, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHEASTERN GREYHOUND LINES and
G. D. (HAPPY) MASTERS,
Petitioners,

vs.

FRANK A. McCAFFERTY,
Respondent.

RESPONSE AND BRIEF

Of Respondent to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT.

The response to the petition for a writ of certiorari will take up the petition in paragraphs as enumerated by the petitioners.

1. Statement of petitioners in Paragraph 1 is admitted.

2. Statement of petitioners in Paragraph 2 is admitted.

3. Statement of petitioners in Paragraph 3 is admitted.

4. Statement of petitioners in Paragraph 4 is admitted.

5. Upon the trial of the issues before a jury, the verdict was rendered for plaintiff in the sum of $12,005.50.

6. The statement of petitioners with reference to the form of verdict submitted by the court is admitted. The verdict was returned at 5:00 P. M., and at 5:05 P. M., same day, the court adjourned finally. The following day, it was discovered that the name "G. D. (Happy) Masters" had a single, dim pencil line drawn through it. Thereafter, the court entered a judgment against the Southeastern Greyhound Lines and entered no judgment of any kind, for or against, the petitioner, Masters,

7. Respondent admits statement of petitioners in Paragraph 7 as to the motion and grounds for a new trial being filed, but states that it was filed 26 May.

8. The respondent admits petitioners' statement in Paragraph 8 and adds to it that the order entered overruling the motion and grounds for a new trial was entered 28 May, and that the motion to set aside the order overruling the motion and grounds for a new trial and the motion for a judgment notwithstanding the verdict was filed 21 June.

9. The respondent admits the statement of petitioners in Paragraph 9.

ARGUMENT.

Comes Frank A. McCafferty, Respondent, and says that the petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be denied for the reasons hereinafter set out.

The decision of the district court and the circuit court of appeals held that there was no finding for or against the servant, Masters. The action of the District Court and the Circuit Court of Appeals does not violate the doctrine laid down in the Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, because the precise question determined by the District Court and the Circuit Court of Appeals has never been presented in that form to the Court of Appeals of Kentucky. Where this situation exists, it is entirely fitting and proper for the Federal Courts to exercise their own judgment in order that justice may be done. It is not definitely known who drew the single pencil line through the name of Masters. It was not even discovered by anyone until the following day after the verdict was rendered and after the court had finally adjourned.

The petitioners complain of the following language used in the opinion of the Circuit Court of Appeals:

> "He was not required to obtain a verdict and judgment of liability against Masters individually as a prerequisite to recovery against Southeastern."

We think that the Circuit Court of Appeals was absolutely correct in this statement, as we think it is the universal rule, and too elementary to require citations of authority to state, that the respondent could have sued either the Southeastern Greyhound Lines or Masters. Even if the statement of the petitioners is true, which we vigor-

ously deny, that the Kentucky law is that the verdict in this case is a verdict in favor of Masters and against the Southeastern Greyhound Lines, the petitioners must avail themselves of this error by proper procedure. The Federal Rules of Procedure, and not Rules of State Practice, govern in Federal Courts.

In Haufman v. Atlantic Greyhound Corporation, 41 Fed. Supp. 252, the court said:

> "Since this is a matter of procedure, Rules of State Practice are not followed in the Federal Courts."

In Aetna Casualty and Surety Company v. Yeatts, 122 Fed. 2d 350, 4th Circuit, Judge Parker, speaking for the court, said:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice."

The verdict was returned 23 May, the judgment entered 24 May, motion and grounds for a new trial was filed 26 May, order overruling motion and grounds for a new trial was entered 28 May, and the motion of the petitioners to set aside the order denying the new trial and permit them to file additional motion and grounds for a new trial and a judgment notwithstanding the verdict was filed 21 June.

The Circuit Court of Appeals said that the motion of petitioners of 21 June was in substance a motion for a judgment notwithstanding the verdict. It was unauthorized for two reasons: (1) because petitioners, Southeastern Greyhound Lines et al., had never moved for a directed verdict at any time during the progress of the trial and (2) because it was filed more than ten days after the verdict [Rule 50 (b), Rules of Civil Procedure].

If this action by the petitioners, Southeastern Greyhound Lines et al., be considered to be a motion for a new trial, it still was not filed in time [Rule 59 (b) of the Rules of Civil Procedure.] For this reason, the cases cited by the petitioners, to-wit: Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078, is not applicable, since Federal Courts are governed by Federal Rules of Procedure, and the Federal Rules of Procedure do not authorize an appeal unless taken in accordance with the rules. Even under Kentucky Rules of Practice, petitioners would have had to file motion and grounds for a new trial and a proper bill of exceptions as was done in all the Kentucky cases cited by petitioners in order for the appellate court to hold according to their views. Where there is no timely motion for a new trial or a timely motion for a judgment notwithstanding the verdict, the sufficiency of the plaintiff's petition to sustain the judgment would be all that even the Kentucky courts could pass on. Johnson et al. v. Hall Hotel Company, 306 Ky. 140, 206 S. W. (2d) 490; Wardrup v. Johnson et al., Bell Grocery Company v. same, 298 Ky. 797, 184 S. W. (2d) 85; Hickey v. Glass, 285 Ky. 484, 149 S. W. (2d) 535. There is no place in the record where the petitioners contend that the original petition is not sufficient to sustain the verdict. We see (1) that we are proceeding under the Federal Rules of Procedure and the petitioners have failed to comply with these rules, (2) that if we were proceeding under the Rules of Procedure for the Commonwealth of Kentucky, which we are not, they would still have failed to comply with such rules.

Bateman v. Donovan, 131 Fed. (2d) 759, C. C. A. 9, does not hold as represented by the petitioners. Petitioners make this quotation:

> "It appears that the trial court granted a new trial; and subsequently, on motion of the appellees, filed 47 days later, setting aside such order, the question was

presented whether the District Court had power to reconsider its order granting a new trial, and the Ninth Circuit Court held:

> 'It is true that the Rules of Civil Procedure make no provision for such action, but it is likewise true that they do not forbid it.'

"The Court also pointed out that under the Federal Rules of Civil Procedure the court has the power to vacate any final decrees of judgment."

As a matter of fact, the court said in that case that it had power to vacate even final decrees at any time within the term. And that when a new trial was granted, the case remained within the power of the court to alter that decree since such decree was merely interlocutory.

In this case, the motion and grounds for a new trial was overruled; and then after the expiration of the ten days, and after the District Court had finally adjourned and lost control of the judgment, the petitioners attempted on 21 June to file additional grounds for a new trial or motion for judgment notwithstanding the verdict, whichever it might have been. In either case, the District Court had lost control of the case and the petitioners had lost their rights under the Federal Rules of Procedure by failing to make their motions in a proper manner or within the required time.

National Popsicle Corporation et al. v. Hughes, 32 Fed. Supp. 397, does not hold as represented by the petitioners, but holds absolutely to the contrary. The court said:

> "Unless, however, the time limit for taking proceedings to modify or vacate a final judgment is otherwise specified in the Federal Rules of Civil Procedure, that limit is still the expiration of the term in which the judgment became final. It would be contrary to

sound reasoning as well as settled principles of federal law to construe Rule 6 (c) to mean that a court has continuing jurisdiction over its final judgments and decrees. The power of the court over its final judgments must end some time. If the period of termination is specified in the Rules of Civil Procedure, that period governs. Otherwise, the end of the term marks the termination of the court's power, in accordance with settled law."

The District Court and the Circuit Court held:

1. That respondent could have sued either of the petitioners and that the evidence did support the judgment.

2. That there was no judgment either for or against Masters and a mistrial or no trial so far as he was concerned.

3. That even if the verdict had been construed as a verdict for Masters and against the Southeastern Greyhound Lines, the petitioners failed (a) to move for a directed verdict at any time (b) to bring the verdict to the court's attention in a motion and grounds for a new trial in time (c) to move for a judgment notwithstanding the verdict in time.

4. (a) That the Federal Rules of Procedure govern.

(b) Even if the State Rules of Procedure govern, the petitioners did not proceed properly and timely.

The petitioners state that the decision of the Circuit Court of Appeals below is in conflict with the Ninth Circuit Court of Appeals on the same question. They cite no authority in support of it. The courts have said:

"As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari. Supreme Court rules, Rule 38

(5), 28 U. S. C. A. following section 354." Ruhlin et al. v. New York Life Insurance Company, 58 S. Ct. 860, 304 U. S. 202.

The courts have said that the discretion vested in the supreme court to review the decisions of the circuit court of appeals by certiorari, Act. Cong. March 3, 1891, Sec. 6, 26 Stat. 828, will only be exercised in matters of gravity and general importance. In re Woods, 12 S. Ct. 417, 143 U. S. 202. The Supreme Court further said that the jurisdiction conferred on the Supreme Court to review decrees of circuit court of appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance which it is in the public interest to have decided by the court of last resort. Magnum Import Co. v. Coty, 43 S. Ct. 531, 262 U. S. 159.

Even if the petitioners had proceeded properly and timely to call the attention of the court to the verdict, the decision of the District Court and of the Circuit Court in no wise violates the law as stated in the Erie Railroad Company case, supra, because the precise question here presented has never been presented to the Court of Appeals of Kentucky; and we feel sure if it should be presented to the Court of Appeals of Kentucky that it would show the same reasoning as the District Court and the Circuit Court did.

The respondent had a meritorious cause. He introduced sufficient evidence to sustain his case. The misunderstanding or error, if any, arose because of error in the instructions of the District Court. That error was never brought to the court's attention in any legal manner. To deprive respondent of his judgment in the summary manner in which petitioners are attempting to do so would be a travesty on justice and not only be contrary to the

letter of the law, but would likewise be contrary to the spirit of the law.

We do not think that this is a case of gravity or of such general importance that it would warrant a writ of certiorari or a review by the Supreme Court.

CONCLUSION.

We earnestly insist that this matter has been heard and seriously considered by the District Court and the Circuit Court of Appeals and that their conclusions of law and facts have been correctly reached and the application of petitioners should be denied.

Respectfully submitted,

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